

File

**BEFORE THE
STATE OF WISCONSIN
Division Of Hearings And Appeals**



In the Matter of the Application of James and
Herminia Milam for Water Quality Certification to
Place Fill in a Wetland, Town of Norway, Racine
County, Wisconsin

Case No.: 3-SE-96-061

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on July 9, 1997 at Racine, Wisconsin, Jeffrey D. Boldt, administrative law judge presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

James and Herminia Milam, by

Peter J. Ludwig, Attorney
P. O. Box 190
Burlington, Wisconsin 53150-0190

Wisconsin Department of Natural Resources, by

Dan Graff, Attorney
P. O. Box 7921
Madison, Wisconsin 53707-7921

FINDINGS OF FACT

1. James and Herminia Milam (the applicants), 8615 Hart Drive, Wind Lake, Wisconsin, 53185, completed filing an application with the Department for water quality certification pursuant to Section 401 of the Clean Water Act and secs. NR 103 and 299, Wis. Admin. Code.

2. The applicants own real property located in the SW 1/4, NW 1/4, in Section 5, Township 4 North, Range 20 East, Racine County.

3. The applicants propose to fill approximately .72 acres of wetland located on their property in Wind Lake, Wisconsin. The proposed fill area consists of large portions of Lots 13 and 14 as indicated on Exhibit 2. A 20 foot drainage easement (ten feet on each lot) runs between the west lot line of Lot 14 and the east lot line of Lot 13. Id. A small portion of Lot 12 will also be filled, and the DNR does not object to this part of the fill proposal.

4. The project purpose is construction of residential lots in a subdivision known as Anna Acres. The proposed project purpose is not wetland dependent, because residential construction does not require location in or adjacent to surface waters or wetlands to fulfill its purpose within the meaning of sec. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code.

5. The parties stipulated at hearing that the proposed fill site is a wetland. There is no question that the subject parcel is wetlands within the meaning of Wisconsin law. The area supports hydrophytic vegetation, including cattails. The project site is identified on the Wisconsin wetlands inventory map. However, a 1995 Southeast Wisconsin Regional Planning Commission (SEWRCP) plan projected filling of the project site as part of a long-term plan for the area. The DNR considers a regional plan in processing a water quality certification, but the regional plan does not determine if state standards are met. (Schumacher)

6. The project proponent has not demonstrated that there are no reasonable alternatives to the project as proposed. There are clearly upland areas in the vicinity of the proposed fill sufficient to place single family dwellings, specifically on a combined Lots 12 and 13 and 14 and 15.

The alternatives analysis submitted by the applicants (Exhibit 4), focused in large part on economic gains which would be lost if the proposed area were not filled in accordance with the 1979 plat. In processing this certification application for the Department, Ms. Schumacher also attempted to calculate lost profits as an indication of the reasonableness of practicable alternatives. However, the calculations originally submitted by the Milams were incorrect, as they projected a higher cost for fill materials than they would be likely to incur. They now intend to make use of fill material already available to them from other development activities.

However, the calculation of lost profits is not part of the practicable alternatives analysis under NR 103, Wis. Admin. Code. NR 103.07, Wis. Admin. Code, defines "practicable alternative" as "...available and capable of being implemented after taking into consideration cost, available technology and logistics in light of overall project purposes." "Costs" incurred are not the same as "profits" foregone in connection with a wetland fill. Not filling a wetland area almost always involves a lower valued use of a parcel, and "lost" (or unrealizable) profits as a result. (Schumacher)

The "overall project purpose" language has been construed very narrowly in related Federal Clean Water Act cases under Section 404. See: Practicable Alternatives under Section 404 of the Federal Clean Water Act After Bersani v. Robichard, 41 Syracuse Law Review, 813. Under related Federal law, there is a rebuttable presumption that a practicable alternative exists if an upland site exists on the same property. *Id.*, p. 819.

In this application, the Milams would clearly prefer to develop Lots 13 and 14 as shown on the original plat and survey. (Ex. 3) However, a practicable alternative that would allow for construction of single family residential dwellings would be to combine Lots 12 and 13 and Lots 14 and 15. (See Ex. 2) These larger lots would, as the applicants concede, sell for more than if the same tracts were subdivided into four lots. While the net proceeds of the combined lots would not be as great as from the proposed fill project, this alternative would allow for construction of single family homes.

A clear preponderance of the evidence indicates that there is a practicable alternative to the fill which would not have a detrimental impact on the existing wetland.

7. The existing wetland area provides stormwater and floodwater attenuation, wildlife habitat, water quality protection and natural aesthetic values.

8. The project proponent has not carried their burden of proving that the proposed fill would not have a detrimental impact on the functional values of the effected wetlands. The applicants rely heavily on the fact that the proposed project would leave a 20 foot wide drainage easement operational and unchanged. The Area DNR Water Regulation and Zoning Specialist, Susan Schumacher, provided undisputed expert testimony that filling of the project area would have a detrimental impact upon the functional values of the wetland complex. Specifically, Schumacher opined that the 20 foot easement area would not provide the same water quality protective function as the existing wetland area. The drainage easement area would move water more quickly and not allow for storage and for plants to filter pollutants in the same fashion as the existing wetland. Further, Schumacher opined that wildlife habitat would be detrimentally impacted by filling in the wetland area, even if the 20 foot drainage easement remained intact. The proposed fill would result in significant detrimental impacts to these important wetland functions.

9. The construction of single family dwelling is not a wetland dependent activity.

10. The Department of Natural Resources has complied with the procedural requirements of sec. 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders relating to water quality certification cases pursuant to sec. 227.43(1)(b), Stats. and NR 299.05(6), Wis. Admin. Code.
2. The proposed fill for construction of residential single-family dwellings is not a wetland dependent activity within the meaning of secs. NR 103.07(2) and NR 103.08(4)(a)(1), Wis. Admin. Code., Wis. Admin. Code because said construction is not of a nature that requires location in or adjacent to surface waters or wetlands to fulfill its basic purpose.
3. Practical alternatives to the fill proposal exist which will not adversely impact wetlands and will not result in other significant environmental consequences. Sec. NR 103.08(4)(a)(2) Wis. Admin. Code. Practical alternatives means available and capable of being implemented taking into consideration cost, available technology and logistics in light of overall project purposes. Sec. NR 103.07(1), Wis. Admin. Code. Taking the above factors into consideration, the applicants have not shown that they could not subdivide their lots in another manner that would serve his basic project purpose without adversely impacting wetlands.
4. The project does not meet the requirements of sec. NR 103, Wis. Admin. Code because the project is not wetland dependent and because there are practical alternatives which will not adversely impact wetlands and will not result in significant adverse environmental consequences. Sec. NR 103.08(4)(a), Wis. Admin. Code.
5. The project proponent has not shown that the activity will not result in significant adverse impacts to the functional values of the affected wetlands, significant adverse impacts to water quality or other significant adverse environmental consequences. There will be "significant detrimental impacts" to the functional values of the subject wetlands. A clear preponderance of the evidence, including all of the expert testimony, indicates that there would be significant detrimental impacts to water quality protection and wildlife habitat if the proposed fill is approved.
6. The subject property is not located within an area of special natural resource interest within the meaning of NR 103.04, Wis. Admin. Code.
7. The Division of Hearings and Appeals has the authority pursuant to NR 299.05, Wis. Admin. Code, to deny, approve or modify a water quality certification if it determines that there is a reasonable assurance that the project will comply with standards enumerated in NR 299.04, Wis. Admin. Code. The Division is not satisfied that there is a reasonable assurance that the project will comply with said standards.

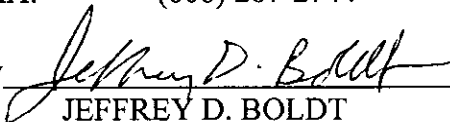
ORDER

IT IS HEREBY ORDERED, that water quality certification be DENIED, and the petition for review be DISMISSED.

Dated at Madison, Wisconsin on August 13, 1997.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 267-2744

By


JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.